

**REDACTED FOR PUBLIC INSPECTION – SUBJECT TO REQUEST FOR  
CONFIDENTIAL TREATMENT PURSUANT TO 47 C.F.R. §§ 0.457 AND 0.459**

May 29, 2020

**Via Electronic Filing**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, D.C. 20554

**Re:** Request for Confidential Treatment: Draft Rural Digital Opportunity Fund Phase I Auction, Notice and Filing Requirements and Other Procedures for Auction 904, Public Notice, AU Docket No. 20-34, WC Docket No. 19-126, WC Docket No. 10-90 (rel. May 19, 2020).

Dear Ms. Dortch,

Space Exploration Technologies Corp. (“SpaceX”) hereby submits the attached redacted version of its ex parte letter in the above-referenced proceeding. A confidential version of the ex parte has been submitted to the Commission in accordance with the Commission’s current procedures.<sup>1</sup>

Pursuant to Exemption 4 of the Freedom of Information Act (“FOIA”) and FCC rules,<sup>2</sup> SpaceX requests confidential treatment of Exhibit A to the ex parte letter, which consists of commercially sensitive information (the “Confidential Information”). The Confidential Information relates to SpaceX network latency testing and performance data and includes company-specific, highly confidential and/or proprietary commercial information, including information protected from disclosure by FOIA Exemption 4,<sup>3</sup> and the Commission’s rules

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<sup>1</sup> *FCC Provides Further Instructions Regarding Submission of Confidential Materials*, Public Notice, DA No. 20-361 (rel. March 31, 2020).

<sup>2</sup> 5 U.S.C. § 552(b)(4); 47 C.F.R. §§ 0.457(d), 0.459; *see also* 18 U.S.C. § 1905 (prohibiting disclosure “to any extent not authorized by law” of “information [that] concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association”).

<sup>3</sup> 5 U.S.C. § 552(b)(4).

protecting information that is not routinely available for public inspection and that would customarily be guarded from competitors.<sup>4</sup>

1. *Identification of Specific Information for Which Confidential Treatment Is Sought (Section 0.459(b)(1)).* SpaceX requests that the Confidential Information be treated as confidential pursuant to Exemption 4 of FOIA and Sections 0.457(d) and 0.459 of the Commission's rules, which protect confidential commercial and other information not routinely available for public inspection. Exhibit A, which is marked as "Confidential Information," concerns SpaceX's proprietary network latency testing information and internal performance data. This is company-specific, competitively-sensitive, business confidential and/or proprietary and commercial information concerning SpaceX's operations that would not routinely be made available to the public, and has been carefully guarded from competitors. If it were disclosed, SpaceX's potential competitors could use it to determine information regarding SpaceX's competitive position, operations, and performance, and could use that information to gain a competitive advantage over SpaceX.

2. *Description of Circumstances Giving Rise to the Submission (Section 0.459(b)(2)).* In connection with the above referenced proceeding, SpaceX is filing the ex parte letter in the following dockets: AU Docket No. 20-34; WC Docket No. 19-126; and WC Docket No. 10-90.

3. *Explanation of the Degree to Which the Information Is Commercial or Financial, or Contains a Trade Secret or Is Privileged (Section 0.459(b)(3)).* The Confidential Information contains company-specific, competitively-sensitive, confidential and/or proprietary, commercial information.<sup>5</sup> This information can be used to determine information about SpaceX's operations that is sensitive for competitive and other reasons. This information is not publicly available, would not customarily be made available to the public in this form and customarily would be

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<sup>4</sup> 47 C.F.R. §§ 0.457(d), 0.459. Under the recent Supreme Court decision in *Food Marketing Inst. v. Argus Leader Media*, 139 S.Ct. 2356 (2019), the submitter is not required to show that the information's disclosure is likely to cause substantial competitive harm. Rejecting such a requirement as inconsistent with the plain text of the FOIA statute, the Court clarified: "At least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4." *Id.* at 2366.

<sup>5</sup> The Commission has broadly defined commercial information, stating that "[c]ommercial" is broader than information regarding basic commercial operations, such as sales and profits; it includes information about work performed for the purpose of conducting a business's commercial operations." *Southern Company Request for Waiver of Section 90.629 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd. 1851, 1860 (1998) (citing *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983)).

guarded from all others, especially potential competitors, that could use the information to enhance their market position.

4. *Explanation of the Degree to Which the Information Concerns a Service that Is Subject to Competition (Section 0.459(b)(4)).* The Confidential Information at issue relates to the network over which SpaceX provides broadband internet access service. The market for broadband internet access service is subject to vigorous competition from other providers. If the information is not protected, SpaceX's competitors and potential competitors will be able to use it to their competitive advantage.

5. *Explanation of How Disclosure of the Information Could Result in Substantial Competitive Harm (Section 0.459(b)(5)).* Since the Confidential Information generally would not be subject to public inspection and would customarily be guarded from competitors, the Commission's rules recognize that release of the information is likely to produce competitive harm.<sup>6</sup> Disclosure could cause substantial competitive harm, because SpaceX's competitors and potential competitors could assess aspects of SpaceX's commercial and network operations and could use that information to undermine SpaceX's competitive position.

6-7. *Identification of Any Measures Taken by the Submitting Party to Prevent Unauthorized Disclosure, and Identification of Whether the Information Is Available to the Public and the Extent of Any Previous Disclosure of the Information to Third Parties (Sections 0.459(b)(6)&(7)).* The Confidential Information is not available to the public and has not otherwise been disclosed previously to the public. SpaceX takes precautions to ensure that this information is not released to the general public or obtained by its competitors and potential competitors through other means.

8. *Justification of Period During Which the Submitting Party Asserts that Material Should Not Be Available for Public Disclosure (Section 0.459(b)(8)).* SpaceX requests that the Confidential Information be treated as confidential indefinitely, as it is not possible to determine at this time any certain date by which the information could be disclosed without risk of harm.

9. *Any Other Information that the Party Seeking Confidential Treatment Believes May Be Useful in Assessing Whether Its Request for Confidentiality Should Be Granted (Section 0.459(b)(9)).* The Commission has recognized that such information is among the categories of commercial information that should be routinely treated as confidential, and the Commission's rules contemplate that this information will be accorded confidential treatment. Under applicable Commission and federal court precedent, the information provided by SpaceX on a

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<sup>6</sup> The Supreme Court's decision in *Argus Leader Media*, 139 S.Ct. at 2361, makes clear that FOIA Exemption 4 applies even when no competitive harm would derive from the release of information. Even if that were not the case, however, Exemption 4 still applies here because substantial competitive harm would result from the release of the Confidential Information.

confidential basis should be shielded from public disclosure. Exemption 4 of FOIA shields information that is (1) commercial or financial in nature; (2) obtained from a person outside government; and (3) privileged or confidential. The information in question clearly satisfies this test.

Additionally, where disclosure is likely to impair the government's ability to obtain necessary information in the future, it is appropriate to grant confidential treatment to that information.<sup>7</sup> Failure to accord confidential treatment to this information is likely to dissuade providers from voluntarily submitting such information in the future, thus depriving the FCC of information necessary to evaluate facts and market conditions relevant to applications and policy issues under its jurisdiction.

If a request for disclosure occurs, please provide sufficient advance notice to the undersigned prior to any such disclosure to allow SpaceX to pursue appropriate remedies to preserve the confidentiality of the information.

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If you have any questions or require further information regarding this request, please do not hesitate to contact me.

Respectfully submitted,

/s/ David Goldman

David Goldman

Director of Satellite Policy

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<sup>7</sup> See *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); see also *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 878 (D.C. Cir. 1992) (en banc) (recognizing the importance of protecting information that "for whatever reason, 'would customarily not be released to the public by the person from whom it was obtained'") (citation omitted).